

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

September 27, 2010 Session

SARAH LOUISE BEAN v. TEPRO, INC.

**Appeal from the Chancery Court for Bedford County
No. 27754 J. B. Cox, Chancellor**

**No. M2010-00264-WC-R3-WC - Mailed - January 26, 2011
Filed - February 28, 2011**

Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. Sarah Louise Bean ("Employee") sustained bilateral shoulder injuries in the course and scope of her employment with Tepro, Inc. ("Employer"). After undergoing surgery on both shoulders, she was released to return to work. Employer was facing reduced work volume at this time, and Employee worked only one day over the course of the next two months. She worked sporadically during the next four months and then was laid off indefinitely due to economic conditions. During the layoff, she applied for and received Social Security disability benefits. When she was called back to work after four months of layoff, she declined to return. At trial, the trial judge heard proof regarding the extent of Employee's permanent physical impairment from Employee's evaluating physician, Employee's treating physician, and a Medical Impairment Registry ("MIR") physician. After the conclusion of the proof, the trial court determined that Employee had sustained a permanent physical impairment of 19% to the body as a whole, that the impairment rating assigned by the MIR physician was rebutted by clear and convincing evidence, that the Employee was subject to the cap imposed by Tennessee Code Annotated section 50-6-241(d)(1)(A), and that she was entitled to an award of 28% permanent partial disability ("PPD") benefits. Both parties challenge the trial court's decision. After review, we modify the award of PPD to 21%, reduce the award of discretionary costs by \$800, and affirm the remainder of the trial court's judgment.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court Modified in Part and Affirmed in Part

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the Court, in which SHARON G. LEE, J., and JERRI S. BRYANT, SP. J., joined.

Jonathan R. Bunn, Tullahoma, Tennessee, for the appellant, Sarah Louise Bean.

A. Gregory Ramos and Lauren Smith, Nashville, Tennessee, for the appellee, Tepro, Inc.

MEMORANDUM OPINION

Factual and Procedural Background

Employer, a manufacturer of weather stripping for automobiles, hired Employee as an assembly line worker beginning in November 2000. During the course of her work, Employee gradually developed pain in both shoulders. In February 2006, she reported these symptoms to Employer, and her claim was accepted as compensable. She was given a panel of physicians and chose Dr. Richard Cole, a general practitioner, for treatment. After providing conservative treatment for a period of time, he ordered an MRI scan of her left shoulder, which revealed a rotator cuff tear.

Employer then offered Employee a panel of specialists for treatment, and she chose Dr. Michael Kioschos, an orthopaedic surgeon. She was first examined by Dr. Kioschos on July 3, 2007, who diagnosed arthritic joint changes and a rotator cuff tear in the left shoulder. On November 19, 2007, Dr. Kioschos performed surgery to repair the torn rotator cuff in Employee's left shoulder. A few months after the surgery, Employee reported an increase in the symptoms of her right shoulder, and an MRI revealed a full thickness tear of the rotator cuff and degenerative changes in the right shoulder. On June 9, 2008, Dr. Kioschos performed surgery to repair the torn rotator cuff in her right shoulder. After a period of recovery and physical therapy, he released Employee from his care on December 2, 2008, placing no permanent restrictions on her activities. Employee testified that Dr. Kioschos advised her that if he restricted her activities, her employment would be terminated. He assigned a 4% permanent anatomical impairment to the body as a whole for the right shoulder injury and a 4% permanent anatomical impairment to the body as a whole for the left shoulder injury based on the American Medical Association Guidelines to the Evaluation of Permanent Impairment ("AMA Guides").

After Employee was released by Dr. Kioschos in December, she contacted Employer about returning to work. Kathy Burch, Employer's employee relations manager, testified that Employer customarily shut down its operation in December for the holidays, and that due to unfavorable economic conditions, the holiday shutdown was extended to include the first two weeks in January 2009. Ms. Burch also testified that

Employer was in the process of reducing its workforce, but employees in Employee's job class were not affected.

In January 2009, Employee worked one day; from February through April, she worked an average of twenty-five hours per week. Other hourly employees worked an average of just over twenty-two hours per week during the same period of time due to a reduced volume of orders from automobile industry customers. This sporadic work schedule continued until April 30, 2009, when Employee was placed on "temporary layoff."

Employee's layoff on April 30 was indefinite. Employer paid her no wages but did continue to pay its portion of her health and life insurance benefits. Employee testified that she understood the layoff to be temporary, considered herself still employed by Employer, and maintained her employment badge and insurance card.

Three days after she was laid off, Employee applied for Social Security disability benefits, based upon her shoulder injuries, diabetes, high blood pressure, and early kidney failure. On August 13, 2009, she received notification that her application had been approved by the Social Security Administration. On August 28, 2009, Ms. Burch called Employee and advised her that she was being recalled to work. On August 31, 2009, the day Employee was scheduled to return to work, her daughter called Ms. Burch and informed her that Employee would not be returning to work.

At the request of her attorney, Employee was examined on June 15, 2009, by Dr. William Kennedy, an orthopaedic surgeon, who opined that she had an impairment of 24% to the body as a whole based on the AMA Guides as a result of her combined shoulder injuries. He recommended that Employee avoid lifting weights in excess of ten pounds frequently or twenty pounds occasionally assuming the use of both hands, and that she also avoid rapid repeated motions with either hand or hammering or jerking with either hand. Dr. Kennedy based the 24% impairment rating on three factors: 1) 10% impairment to each shoulder based on surgical resection of the distal end of the clavicles; 2) 10% impairment to each shoulder as a result of permanent weakness and increased risk of recurrent tearing of the rotator cuffs and 3) 3% to each shoulder for loss of motion. When Ms. Burch called Employee in August to report that work was available, Employer was aware of the restrictions imposed by Dr. Kennedy and was prepared to offer Employee a job assignment comporting with those restrictions.

Because of the disparity between Dr. Kioschos' and Dr. Kennedy's impairment ratings, Employer requested an independent medical examination pursuant to Tennessee

Code Annotated section 50-6-204(d)(5).¹ Dr. McKinley Lundy, an occupational medicine specialist, was selected to examine Employee. He assigned her an impairment rating of 14% to the body as a whole based on the AMA Guides. The primary difference between his rating and that of Dr. Kennedy was the additional 10% impairment rating for each shoulder that Dr. Kennedy had assigned for weakness of the tendons of the rotator cuff. Dr. Lundy opined that the AMA Guides did not provide for such an impairment rating. He testified that the catchall provision on page 11 of the Fifth Edition was for conditions not addressed by the AMA Guides, but that the Fifth Edition of the AMA Guides addressed rotator cuff injuries by means of measurements of range of motion and/or muscle strength, and did not permit additional impairment for reasons such as those given by Dr. Kennedy. In support of his interpretation of the AMA Guides, Dr. Lundy noted that the Sixth Edition includes a diagnosis-related component, but the maximum impairment for a full rotator cuff tear is less than the impairment assigned by Dr. Kennedy for residual weakness of the tendon.

Rodney Caldwell, a vocational evaluator who testified on behalf of Employee, stated that Employee was able to read and perform arithmetic at a twelfth-grade level and had performed poorly on a test of manual dexterity. He testified that, based upon Dr. Kennedy's restrictions, Employee's education, work history, vocational testing, and the local labor market, She was totally disabled and would be unable to perform any competitive work in either the local or national labor markets.

Employee was sixty-one years old at the time of trial and had a high school education. Before working for Employer, she had worked in a chicken-processing plant, as a packer for a pencil manufacturer, and in various sewing factories. She testified that she would have continued to work for Employer throughout June, July, and August of 2009 had work been available. She had not been employed, nor looked for another job, since being laid off. She further attested that she had constant pain in both of her shoulders, which resulted in difficulty doing her housework, especially tasks that required

¹ Tennessee Code Annotated section 50-6-204(d)(5) (2008) provides in pertinent part:

When a dispute as to the degree of medical impairment exists, either party may request an independent medical examiner from the commissioner's registry. . . . The written opinion as to the permanent impairment rating given by the independent medical examiner pursuant to this subdivision (d)(5) shall be presumed to be the accurate impairment rating; provided, however, that this presumption may be rebutted by clear and convincing evidence to the contrary.

her to reach overhead. She testified that she did not believe that she could effectively perform the jobs she had held with Employer.

The trial court determined that Employee had a meaningful return to work, and therefore, her award of permanent partial disability benefits was limited to one and one-half times the anatomical impairment. The trial court then determined that Dr. Lundy's MIR impairment rating of 14% was rebutted by clear and convincing evidence because he had used the incorrect edition of the AMA Guides in formulating his impairment rating. The trial court also found that Dr. Kennedy's impairment rating was not acceptable because there was no discernible basis for the amount of impairment that he assigned for residual tendon weakness. Accordingly, the court found an impairment of 19% to the body as a whole, and awarded 28% permanent partial disability to the body as a whole. The trial court awarded Employee her discretionary costs, which included a charge for Dr. Kennedy's evaluation of Employee. Both parties challenge the trial court's decision. Employee contends that the trial court erred in ruling that she had a meaningful return to work and capping her benefits. Employer argues that the trial court erred in rejecting the impairment rating of the MIR physician and in taxing as a discretionary cost the fee charged by Dr. Kennedy.

Standard of Review

Issues of fact are reviewed *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Meaningful Return to Work

Employee challenges the trial court's decision that she made a meaningful return to work. For injuries occurring after July 1, 2004, Tennessee Code Annotated section 50-

6-241(d)(1)(A) provides that when an employee returns to work for his or her pre-injury employer at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the employee's recovery is capped at 1.5 times the permanent partial impairment rating received.

Whether the employee made a meaningful return to work is, therefore, an important factor in the amount of the PPD award. An employee need not actually have returned to work post-injury to be considered as having made "a meaningful return to work." A meaningful return to work is determined by whether the employer's offer to return the employee to work was reasonable and whether the employee's failure to accept the employer's offer and return to work was reasonable. Tryon v. Saturn Corp., 254 S.W.3d 321, 328 (Tenn. 2008). The facts of each case determine whether the actions of the employer and employee were reasonable. Id. (quoting Newton v. Scott Health Care Ctr., 914 S.W.2d 884, 886 (Tenn. Workers' Comp. Panel 1995)).

The trial court held that Employee had a meaningful return to work and capped her recovery under the statutory limitations. The trial court relied on Edwards v. Saturn Corp., No. M2007-01955-WC-R3-WC, 2008 WL 4378188 (Tenn. Workers' Comp. Panel Sept. 25, 2008), where the court held that a plant-wide layoff does not frustrate a meaningful return to work, and an employee who does not return to work when called back from the layoff is subject to the lower cap set forth in section 50-6-241. The employee in Edwards, who took a voluntary retirement while on layoff status and received a combination of payments that amounted to 95% of his usual wage, was held to have had a meaningful return to work, and thus his recovery was limited by the lower cap.

Employee argues that the ruling in Edwards does not compel the application of the 1.5 multiplier cap. After being released to return to work on December 2, 2008, Employee only worked one day between the release date and the end of January 2009 due to holiday shutdown and lack of volume. From February through the end of April, she only worked an average of 25 hours per work. She was placed on indefinite layoff on April 29, 2009. She was not able to draw unemployment benefits because she had been out of work in previous quarters due to her shoulder injury. When Employer recalled her to work on August 28, 2009, she had no assurance of regular, steady work. Unlike the facts of Edwards, when Employee's doctor released her to return to work, she never returned to full-time work, but only part-time work where she earned only sporadic income. Employee also maintains that Employer's offer to return her to work was not reasonable because, while it was at a wage equal to pre-injury employment, she would be receiving drastically reduced hours and therefore reduced earnings. Employee also believed she could not do the work, even though Dr. Kioschos had released her with no medical restrictions.

Employer argues that Employee's situation is similar to the facts in Edwards, where the employee was laid off but continued to receive employment benefits in the form of health and life insurance compensation. Id. Employer notes that Employee admitted that she still considered herself an employee of Employer during the layoff period and returned to work at the same pre-injury wage. Employer also argues that Dr. Kioschos placed no permanent restrictions upon Employee, and according to Ms. Burch's testimony, the jobs available in August 2009 fell within the restrictions placed on Employee by Dr. Kennedy. Although Employee maintains that she could not return to work due to her shoulder injuries, Employer argues that Employee's entitlement to social security disability benefits, received just two weeks before she was recalled to work, is the primary reason she did not return to work. Furthermore, Employer claims that it acted in good faith in attempting to return Employee to work after she was released, but that economic conditions simply prevented an immediate return to full-time work.

In Nichols v. Jack Cooper Transp. Co., 318 S.W.3d 354 (Tenn. 2010), the Tennessee Supreme Court rejected a bright line rule applicable to all layoffs, instead favoring a fact-intensive method. The Court provided guidance for determining whether there has been a meaningful return to work in the context of a layoff:

Because layoffs and their effect on an employment relationship may take a variety of forms, we decline to adopt, as the trial court did, a bright line rule applicable to all layoffs. Instead, we continue to subscribe, as we did in Tryon, to a fact-intensive method for determining whether a layoff is a "loss of employment" and, therefore, not a meaningful return to work under the workers' compensation statutes. Factors that may assist trial courts in the meaningful return to work inquiry include, but are not limited to, the following: (1) whether layoffs are a customary or expected part of the employee's position and, if so, whether the specific layoff in question falls within the pattern of previous layoffs in the position; (2) whether the employee expected or should have expected, at the time of the layoff, to be recalled to work; and (3) whether the employee received pay and/or benefits while laid off.

Id. at 364-65.

Applying the Nichols factors to the case, we first note that the evidence shows that, although layoffs were customary at Tepro, the number and length of layoffs in 2008 and 2009 were unprecedented due to slowdowns in the automobile business. In addition to the layoffs, Employer also reduced the hours worked by its employees. A reduction in an employee's working hours, however, does not prevent an employee from having a meaningful return to work. Blake v. Nissan North Amer., Inc., No. M2009-02173-WC-

R3-WC, 2010 WL 4513390 (Tenn. Workers' Comp. Panel Nov. 10, 2010). Second, Employee had some expectation of being recalled to work, although the exact timing of the recall was unknown, since she still considered herself an employee and was clearly advised that the layoff was only temporary. During the term of the layoff, Employee periodically contacted Employer asking if there were work opportunities, to which Employer responded there were none at the time, but that Employee should check back in the following weeks. Third, although Employee did not receive wages while she was laid off, she did receive health and life insurance benefits. Finally, we note that Employee was notified that her claim for social security disability benefits was approved just before she was called back to work. When she was asked at trial why she did not go back to work, Employee testified "I had applied for social security disability and I received it. . . . Well I had been approved for it."

As our Supreme Court has observed in Nichols and Tryon, the question of whether an employee has had a meaningful return to work in any given case is to be resolved by an intensive review of the facts of the record. In the matter before us, although there is evidence to support both parties' arguments, the evidence does not preponderate against the trial court's conclusion that Employee had a meaningful return to work. Employee was obviously an industrious and hard worker. She had a solid work history of manual labor beginning when she was seventeen years old. She wanted to return to work and did in fact work for a period of time after undergoing surgery on both her shoulders. She testified that she had constant pain in her shoulders and neck and headaches from the neck pain, in addition to high blood pressure and diabetes. Her husband also suffered from diabetes and required dialysis for his kidney failure. Employee was in poor health and clearly needed regular income to sustain her family. The approval of her claim for social security disability benefits beginning in October 2009 in the amount of \$1,185 per month provided her with much needed regular income and relief from the rigors of assembly line work. Employee's decision not to return to work was certainly understandable considering her situation. Her decision not to return to work was not the result of her injury, but due primarily to the approval of her claim for social security disability benefits. Relevant case law holds that "[s]o long as a return to work is offered, . . . an employee who resigns for reasons unrelated to his injury may not escape the statutory caps," and it appears that Employee did not return to work for reasons unrelated to her injuries. Lay v. Scott Cnty. Sheriff's Dep't, 109 S.W.3d 293, 299 (Tenn. 2003). Accordingly, Employee's recovery should be capped at 1.5 times the permanent impairment rating.

Rebuttal of MIR Impairment

The MIR Registry Program, Tennessee Code Annotated section 50-6-204(d)(5), provides a procedure for resolving disputes concerning the degree of medical impairment.

An independent medical examiner is selected from the commissioner's registry and gives an opinion as to the injured party's permanent impairment rating. The opinion given by the independent medical examiner "shall be presumed to be the accurate impairment rating," but this presumption can be rebutted by "clear and convincing evidence to the contrary." Tenn. Code Ann. § 50-6-204(d)(5).

Clear and convincing evidence exists when there is "no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." Beeler v. Lennox Hearth Prods., Inc., No. W2007-02441-SC-WCM-WC, 2009 WL 396121 at *4 (Tenn. Workers' Comp. Panel Feb. 18, 2009) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n. 3 (Tenn. 1992)). Proof that an MIR physician used an incorrect method or an inappropriate interpretation of the AMA Guides can be used to overcome the statutory presumption. Tuten v. Johnson Controls, Inc., No. W2009-1426-SC-WCM-WC, 2010 WL 3363609 (Tenn. Workers' Comp. Panel Aug. 25, 2010).

The applicable edition of the AMA Guides is the one that was in effect at the time of an employee's injury. Tenn. Code Ann. § 50-6-102 (2) (2008). Employee reported her injury in February 2006, and therefore the AMA Fifth Edition is the edition on which her impairment rating should have been based.

The trial court found that there was clear and convincing evidence that Dr. Lundy, the MIR physician, used the AMA Sixth Edition rather than the Fifth Edition, and therefore the statutory presumption was rebutted. The trial court found an impairment rating of 19% which was between that of Dr. Lundy (14%) and Dr. Kennedy (24%). Employer takes issue with this ruling; Employee asserts it was a correct ruling.

We have carefully reviewed Dr. Lundy's detailed report and his deposition. Dr. Lundy has special training in the evaluation of permanent impairments and is certified by both the American Academy of Disability Evaluating Physicians and the American Board of Independent Medical Examiners. He is very familiar with the AMA Guides and has given lectures to physicians, attorneys and other groups on the Guides. His report very clearly indicates that he relied on the AMA Fifth Edition when he made his evaluation. There is no mention in his report of the Sixth Edition. Likewise, his reliance on the Fifth Edition is evident in his deposition. At one point in the deposition he was asked:

Q. In your impairment rating in this case, in Ms. Beans' [sic] case, that 14 percent whole body impairment was under the Fifth Edition of the AMA Guides?

A. Yes.

The confusion regarding his use of the Sixth Edition arose when Dr. Lundy was explaining his disagreement with Dr. Kennedy's addition of 10% to the impairment rating for intrinsic weakness of the rotator cuff. Dr. Lundy explained that this was not provided for in the Fifth or Sixth Edition of the Guides. He also noted that even using the Sixth Edition, her impairment rating would not exceed 14%.

The evidence preponderates against the trial court's finding that there was clear and convincing evidence that Dr. Lundy's impairment rating was not accurate. Therefore, Dr. Lundy's opinion is presumed to be the accurate impairment rating. Tenn. Code Ann. § 50-6-204(d)(5) (2008). In accordance with those findings, the award of disability benefits must be based on an impairment rating of 14% to the body as a whole. Consistent with the trial court's finding that Employee had a meaningful return to work, the award of benefits is modified to 21% permanent partial disability to the body as a whole.

Award of Dr. Kennedy's charges as discretionary costs

The Workers' Compensation Law contemplates that the employer will bear the necessary expenses of obtaining and presenting medical evidence. Tennessee Code Annotated section 50-6-226(c)(1) (2008) provides that

[t]he fees charged to the claimant by the treating physician or a specialist to whom the employee was referred for giving testimony by oral deposition relative to the claim shall, unless the interests of justice require otherwise, be considered a part of the costs of the case, to be charged against the employer when the employee is the prevailing party." In addition, Tennessee Rule of Civil Procedure 54.04(2) provides that "reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials" may be recoverable as discretionary costs.

Employer takes issue with the trial court's order including as a discretionary cost Dr. Kennedy's \$800 charge for his evaluation of Employee. Neither Tennessee Code Annotated section 50-6-226(c)(1) nor Tennessee Rule of Civil Procedure 54 provide that a fee for conducting an independent medical examination can be taxed as a discretionary cost. Miles v. Marshall C. Voss Health Care Ctr., 896 S.W.2d 773, 776 (Tenn. 1995); Pyles v. Pacific Coast Feather Co., No. E2004-01738-WC-R3-CV, 2005 WL 1389880, *4 (Tenn. Workers' Comp. Panel June 13, 2005). While Dr. Kennedy generated a report after his examination that was stipulated to, the stipulation does not render his charge for the examination recoverable under Rule 54. The trial court abused its discretion by awarding Employee Dr. Kennedy's evaluation fee of \$800 as a discretionary cost. Therefore, the trial court's order granting discretionary costs is reduced by \$800.

Conclusion

The judgment of the trial court is modified to award 21% permanent partial disability benefits to Employee; the award of discretionary costs is reduced by \$800, and the trial court's judgment is otherwise affirmed. Costs of this appeal are assessed to Sarah Louise Bean and her surety for which execution may issue if necessary.

JON KERRY BLACKWOOD, SENIOR JUDGE

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**Chancery Court for Bedford County
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No. M2010-00264-WC-R3-WC - Filed - February 28, 2011

JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Sarah Louise Bean and her surety , for which execution may issue if necessary.

PER CURIAM